Mariah, Inc. *and* United Association of Plumbers and Pipefitters, Local Union No. 189, AFL–CIO–CLC, Petitioner. Case 9–RC–16783

November 25, 1996

ORDER DENYING REVIEW

CHAIRMAN GOULD AND MEMBERS BROWNING, FOX, AND HIGGINS

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached). The request for review is denied as it raises no substantial issues warranting review.[1]

[1] In its request for review, the Employer seeks review only of the hearing officer's refusal to permit the Employer to introduce evidence allegedly relevant to the issues of whether the Petitioner is qualified to represent the petitioned-for employees, whether a different unit might be appropriate, and whether the striking employees are eligible to vote. It is beyond cavil that the role of the hearing officer is to ensure a record that is both complete and concise. See generally Secs. 11184.1 and 11216 et seq. of the Board's Casehandling Manual. Here, the hearing officer, consistent with this duty, exercised her authority to exclude irrelevant evidence and to permit the Employer to make an offer of proof. Our consideration of that offer establishes the correctness of the hearing officer's decision to exclude the testimony. Thus, with particular respect to the issue of strikers, we note the Board's decision in *Universal Mfg. Co.*, 197 NLRB 618 (1972) (the issue of striker eligibility is best left to a postelection proceeding). And, with respect to the unit issue, we note that the Employer does not contradict the Regional Director's specific finding that, although given an opportunity to do so, the Employer declined to take a position on the appropriateness of the unit, a unit that is presumptively appropriate.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The following employees of the Employer[1] constitute a unit[2] appropriate for the purpose[3] of collective bargaining within the meaning of Section 9(b) of the Act:[4]

> All full-time and regular part-time employees who work at or out of the Employer's Columbus, Ohio facility, excluding all office clerical employees, managerial employees and all professional employees, guards and supervisors as defined in the Act.

Based on a careful review of the entire record and the Employer's arguments at the hearing and in its posthearing brief, the Employer's contentions are without merit. Although the assertion in the Employer's brief that the Regional Director, under the rationale of *Angelica Healthcare Services Group*, 315 NLRB 1320 (1995), cannot direct an election without first holding an appropriate hearing is correct, I find that the "appropriate hearing" requirement was satisfied in this case. The Employer was notified of the hearing and was given the opportunity to present evidence on all relevant issues. The fact that the hearing officer rejected certain evidence offered by the Employer on the ground that it was not relevant to the issues involved did not deny the Employer an "appropriate hearing" within the meaning of *Angelica Healthcare Services*, supra. Assuming that the hearing officer could have exercised her discretion differently on certain evidentiary rulings, such rulings were not prejudicial and did not deny the Employer an "appropriate hearing." Id. at 1321.

Although not cited by the Employer in its brief, I am mindful of the Board's recent decision in *Barre-National, Inc.*, 316 NLRB 877 (1995). In my view, the holding in *Barre*, like the decision in *Angelica*, does not require a finding that the employer was denied an appropriate hearing. In *Barre*, the hearing officer refused to allow the employer to present any evidence with respect to the supervisory status of 24 line and group leaders, constituting 8 or 9 percent of the total unit, and instead declared that a decision would issue permitting these individuals to vote subject to challenge. The Board found the employer had been denied an appropriate hearing by refusing to allow it to present any evidence on the supervisory status of the line and group leaders.

In finding that the employer in *Barre* had been denied a fair hearing, the Board noted that Section 9(c)(1) of the Act provides for an appropriate preelection hearing when a petition is filed seeking a representation election. This procedure is implemented in Sections 101.20(c), 102.64(a), and 102.66(a) of the Board's Rules and Regulations. Section 101.20(c) provides, inter alia:

> The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.

Section 102.64(a) provides, inter alia:

> It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under section 9(c) of the Act.

Finally, Section 102.66(a) provides, inter alia:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to in-

[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Petitioner appears as amended at the hearing.

[3] The Employer maintains that the hearing officer's rulings, which prohibited it from presenting certain evidence, effectively denied it a hearing on the issues as required by the Act. Initially, the Employer asserts that the hearing officer refused to take any evidence on whether the Petitioner is qualified or permitted to represent the Employer's employees in the petitioned-for unit. Second, the Employer maintains that the hearing officer failed to allow the introduction of evidence necessary to establish whether the unit sought is an appropriate unit for the purposes of collective bargaining. Third, the Employer maintains that it should have been permitted to litigate the issue of the eligibility of certain striking employees.

[4] The Employer, a corporation, is engaged as a mechanical contractor in the building and construction industry performing plumbing, pipefitting, heating, ventilation and air conditioning, and process piping work in the Columbus, Ohio metropolitan area. There is no history of collective bargaining affecting any of the approximately 14 employees in the unit found appropriate.

troduce into the record documentary and other evidence.

I have concluded that the hearing in this case satisfies all the Board's requirements for an "appropriate hearing." Here, unlike *Barre*, the Employer was given an opportunity to present evidence on all relevant issues. As discussed infra, the record is adequate on all three issues raised by the Employer. Initially, the record shows that the Petitioner is qualified to represent the petitioned-for employees. Second, there is sufficient evidence to make a unit determination and the Employer was given an opportunity to state its position and present evidence on the unit issue. The fact that the Employer declined to take a position on the unit does not prevent the Regional Director from making a unit determination. Finally, the hearing officer's ruling that the eligibility of strikers was best left for resolution, if necessary, in a post-election proceeding was correct. Although the hearing officer denied the Employer the opportunity to introduce certain testimony and documents, as discussed infra, the evidence which was excluded did not go to relevant issues. Thus, the hearing in the subject case was appropriate under the rationale of *Angelica Healthcare Services*, supra, and *Barre-National*, supra.

Initially, the Employer contends that the hearing officer committed prejudicial error by refusing to allow it to present evidence on whether the Petitioner was qualified to represent the petitioned-for employees. Specifically, the Employer alludes to the hearing officer's refusal to permit it to introduce the Petitioner's constitution and bylaws and the Petitioner's contracts with other employers in the Columbus, Ohio area. The Employer claims these documents would show that the Petitioner does not and cannot represent the type of employees employed by the Employer and sought by the petition. The Employer was allowed to state its position by way of an offer of proof. Assuming the validity of the Employer's offer of proof that the Petitioner's constitution precludes it from representing the petitioned-for employees, under well settled Board principles, such a constitutional prohibition does not bar proceeding on this petition. Moreover, the fact that the current contracts to which the Petitioner is a party may cover employees only engaged in plumbing and pipefitting work is not relevant to whether the Petitioner is qualified to represent the petitioned-for employees. Thus, the Board has consistently held that it is a labor organization's "willingness, rather than its constitutional ability," to represent employees "which is the controlling factor." *Mayfield Industries*, 126 NLRB 223, 224 (1960). See also *Community Service Publishing*, 216 NLRB 997 (1975); *"M" Systems*, 115 NLRB 1316 fn. 2 (1956); *Hazelton Laboratories*, 136 NLRB 1609 (1962). Here, the Petitioner has expressed its willingness to represent the employees in issue. I also note that in *Community Service Publishing*, supra, cited by the Employer in its brief, the Board directed an election, noting that the union had expressed a willingness to represent employees who were not part of its traditional craft jurisdiction. The Board held that any certification could subsequently be revoked on a showing that the union had not complied with its statutory duty to fairly represent the employees in the unit.

In addition, the circumstances in *United Truck & Bus Service Co.*, 257 NLRB 343 (1982), in which the Board dismissed the petition, are clearly distinguishable. In *United Truck*, the labor organization admitted only "public employees" to membership. The Board found that because the union did not deal with "employers" or represent "employees" within the meaning of the Act, it was, therefore, not a labor organization within the meaning of Section 2(5) of the Act. Inasmuch as the union in *United Truck* was not a labor organization within the meaning of the Act, the Board dismissed the petition. Unlike *United Truck*, in the instant case, the parties stipulated that the Petitioner is a labor organization and the issue raised by the Employer is only whether the Petitioner is qualified to represent the petitioned-for employees. Here the Petitioner has expressed a willingness to represent the employees, which circumstance is controlling. *Kodiak Island Hospital*, 244 NLRB 929 (1979); *Community Service Publishing*, supra. See also *Teamsters Local 2000*, 321 NLRB 1383 (1996).

Likewise, the Employer's contention that the hearing officer failed to develop an adequate record on which to determine the appropriate unit is without merit. The Petitioner seeks to represent essentially a unit comprising all of the Employer's employees who work at or out of its Columbus, Ohio facility. Although given the opportunity to do so, the Employer declined to take a position on the appropriateness of the unit.

The record discloses that all of the Employer's employees perform plumbing, pipefitting, heating and air conditioning, and any other work required by the Employer and are not identified separately by craft. Moreover, the record shows that all of the Employer's projects are located in the Columbus, Ohio area and employees are regularly transferred among jobs by the vice president of operations, Andrew Morbitzer, who, along with the Employer's president, James Richard Lantz, is responsible for hiring, discharging, and disciplining employees and for establishing all terms and conditions of employment.

It is clear that the unit sought by the Petitioner, essentially comprising all employees of the Employer who work at or out of its Columbus, Ohio facility, is presumptively appropriate for the purposes of collective bargaining. *Berra Publishing Co.*, 140 NLRB 516 (1963); *Penn Color, Inc.*, 249 NLRB 1117 (1980). It is also noted that a labor organization's desire as to the unit is always a relevant consideration. *Marks Oxygen Co.*, 147 NLRB 228 (1964). Moreover, the Employer's contention that certification of the Petitioner as the representative of the employees could result in jurisdictional disputes and other work-related problems are not proper for resolution in this proceeding. The Board has traditionally held that "certifications are not granted to unions on the basis of specific work tasks, types of machines operated or on union jurisdictional claims" but are issued on the basis of employee classifications performing related work functions under a community-of-interest analysis. *Ross-Meehan Foundries*, 147 NLRB 207 (1964); *Plumbing Contractors Assn.*, 93 NLRB 1081 (1951).

Based on the foregoing, it is clear, and I find, that the overall unit sought by the Petitioner is appropriate. All employees perform the same work, out of the same location, under the same supervision. The fact that the employees may perform work that transcends traditional craft boundaries does not destroy their community of interest or render the overall employee unit sought by the Petitioner inappropriate.

Gas Service Co., 140 NLRB 445 (1963); *Ross-Meehan Foundries*, supra. As the Court of Appeals for the District of Columbia noted in *NLRB v. Cleveland Construction Co.*, 448 F.3d 1010 (D.C. Cir. 1995), cited by the Employer in its brief, "under NLRB law, the Board first looks to the unit sought by the union; if the unit is appropriate, the Board's inquiry ends." Inasmuch as the overall unit sought by the Petitioner is clearly appropriate and as no other labor organization seeks to represent any other grouping of employees, it is not necessary to determine whether a less comprehensive unit or units of the Employer's employees would also be appropriate. *P. Ballentine & Sons*, 141 NLRB 1103 (1963); *Penn Color*, supra.

None of the other cases cited by the Employer requires a contrary finding. In *R. B. Butler, Inc.*, 160 NLRB 1595 (1966), the labor organization sought certain laborers of the employer working within a restricted geographic area. The Board, consistent with my finding in this case, held that an overall unit was presumptively appropriate. *R. B. Butler, Inc.*, supra at 1599. In *Longcrier Co.*, 227 NLRB 62 (1985), cited by the Employer, the Board merely found separate units at each construction site of the employer to be appropriate where, unlike here, hiring, wages, and other working conditions were established by the superintendent on each individual project.

The Board in *Del-Mont Construction Co.*, 150 NLRB 85 (1964), relied on by the Employer, found a combined unit of laborers and truckdrivers to be appropriate as they, like the employees in the instant case, "had related interests and no [other labor organization] sought to represent them separately." *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962), cited by the Employer, presented a different issue than the one raised in the instant case. In *Kalamazoo*, the labor organization sought to sever truckdrivers from an existing unit. A similar severance issue was involved in *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967). The instant case does not involve a severance issue, but merely whether an overall unit of the Employer's employees is appropriate. Finally, in *Modern Plastics Corp. v. McCullock*, 400 F.2d 14 (6th Cir. 1968), cited by the Employer in support of its position, the court merely held that the Board, in investigating a petition, need not check a union's showing of interest against an employer's eligibility list of employees to determine whether a question concerning representation existed.

Finally, the Employer's contention that the hearing officer erred by refusing to take evidence on the eligibility of the striking employees lacks merit. As discussed infra, the issue of the eligibility of strikers to vote in an election is best left to a posthearing proceeding. *Universal Mfg. Co.*, 197 NLRB 618 (1972).

Having carefully considered the entire record and the Employer's brief, I find that the hearing officer's rulings are free from prejudicial error and did not deny the Employer an "appropriate hearing." *Angelica Healthcare Services Group*, supra. Moreover, the documents offered by the Employer which were rejected by the hearing officer as well as its offer of proof are not relevant to whether the Petitioner qualifies to represent the petitioned-for employees. It is the Petitioner's willingness to represent the employees that is the controlling factor. *Mayfield Industries*, supra. Moreover, the record establishes that the overall unit sought by the Petitioner is appropriate. *Ross-Meehan Foundries*, supra. Finally, any issue with respect to the eligibility of strikers can best be resolved in a posthearing proceeding. Accordingly, I find that the Employer's insistence on introducing evidence which is not relevant was properly rejected by the hearing officer. I therefore find that there has been an "appropriate hearing" which raises a question concerning representation and based on my conclusion that the Petitioner seeks an appropriate unit, I shall direct an election in this case. *Angelica Healthcare Services Group*, supra.

The Petitioner seeks to represent essentially a unit comprising all employees of the Employer who work at or out of its Columbus, Ohio facility, which I have previously found to be appropriate for the purposes of collective bargaining. *Ross-Meehan Foundries, supra; Plumbing Contractors Assn.*, supra; *Penn Color, Inc.*, supra. Accordingly, I shall direct an election in such unit.

Although it refused to take a position on the appropriateness of the unit, the Employer maintains that certain striking employees have declined offers of reinstatement or abandoned their jobs and are, therefore, not eligible to vote. Initially, it is well settled that to disenfranchise a striking employee, it must be shown by objective evidence that the striker has abandoned his/her interest in the struck job. *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962). The mere fact that a striker may have obtained another job, even one with better benefits, does not constitute objective evidence sufficient to establish a forfeiture of a striker's eligibility. *Akron Engraving Co.*, 170 NLRB 232 (1968); *Pacific Title & Porcelain Co.*, supra. As the hearing officer recognized in refusing to take substantial evidence on this issue, the Board generally does not rule on eligibility questions of this type unless the ballots are determinative of the results of the election and, therefore, defers resolution of such issues to postelection proceedings. *Universal Mfg. Co.*, supra. Accordingly, any issues with respect to the eligibility of the strikers to vote in the election are deferred to an appropriate postelection proceeding.

The record discloses that a strike at the Employer's facility commenced about November 12, 1995, and some employees are still on strike. In the event these striking employees are economic strikers who have been replaced, they could potentially be disenfranchised unless the election is conducted within 12 months of the commencement of the strike. *Wahl Clipper Corp.*, 195 NLRB 634 (1972). Accordingly, on October 30, 1996, I issued a Show Cause Order giving the parties an opportunity to state their position on this issue.

Both parties filed a timely response to the issue raised in the Order to Show Cause. In its response, the Employer initially reiterates the position taken in its brief that it should have been permitted to litigate the eligibility of the strikers at the hearing. As previously noted, however, this issue is best left for resolution in a postelection proceeding. *Universal Mfg. Co.*, supra. With respect to whether an expedited election is appropriate, the Employer asserts in its response that a determination to conduct such an election has already been made, but maintains that no certification should issue until the Board has been given the opportunity to review any decision and direction of election. Moreover, the Employer asserts that no election should be directed before November 8, 1996, to give the parties time to engage in an appropriate campaign. Although the Employer's position on an expedited

election is ambiguous, I construe its response as being opposed to the expedited procedure.

The Petitioner points out that pursuant to the terms of a settlement agreement in Cases 9–CA–33410, et al., the Employer has agreed to treat the four striking employees as unfair labor practice strikers and on their unconditional offer to return to work will offer them immediate and full reinstatement to their former position of employment. The Employer's obligation continues throughout the notice posting period of the settlement agreement. The official records of the Board, of which I have taken administrative notice, disclose that the posting period of the settlement agreement will end, at least, by November 17, 1996. The Petitioner asserts that all four strikers "will return unconditionally to work before the end of the posting period" and the "need for an expedited election does not exist."

Having carefully considered the positions of the parties and as it now appears that the striker eligibility issue contemplated by the Order to Show Cause is moot, I find that it is not necessary to expedite the election in this case to avoid disenfranchising otherwise eligible striking employees. See *Kingsport Press, Inc.*, 146 NLRB 260 (1964). Accordingly, I shall direct an election in this case in accordance with the Board's normal procedures.